



HR LEGAL SUMMIT

FMLA AMENDMENTS What Has Changed?

Presented By:

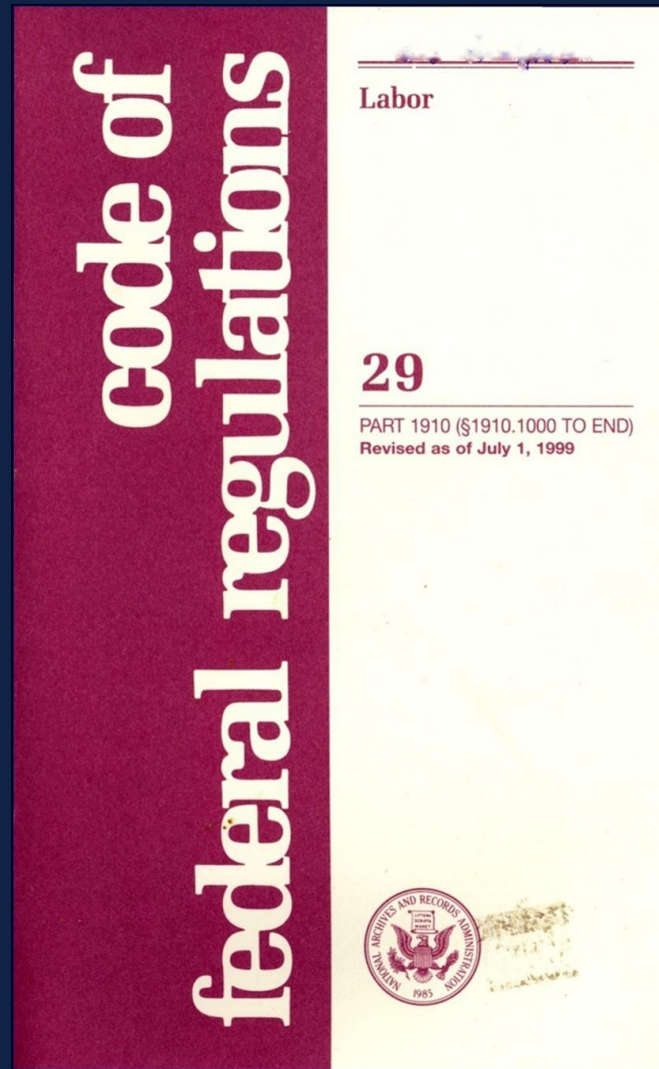
Timothy W. Lindsay

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FIRST CLASS SERVICE, COAST TO COAST

EMPLOYERS & LAWYERS, WORKING TOGETHER

Part I: Revisions to Existing Regulations



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COVERAGE: ELIGIBILITY

12 - Months Employment: §825.110(b)

- Previous:
 - Must have one year of service which need not be continuous

- *Regulatory Revision:*

Service prior to a 7-year break in service is not counted unless:

- Break was due to National Guard/Reserve military service, or
- Written agreement (CBA) exists stating employer's intention to rehire employee after break in service

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COVERAGE: SERIOUS HEALTH CONDITION

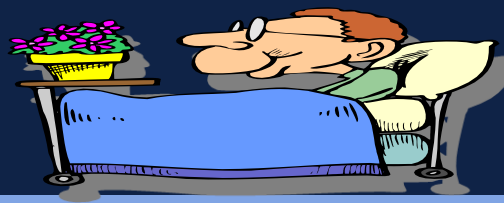
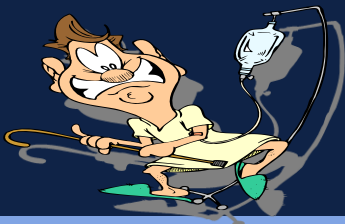
Continuing Treatment - Incapacity & Treatment: §825.115(a)

■ Previous:

- Period of incapacity of more than 3 consecutive calendar days and subsequent treatment either: at least 2 times; or 1 treatment plus continuing care by a health care provider

■ *Regulatory Revision:*

- 3 days must be full days and first in-person treatment must occur within 7 days of incapacity
- Treatment by health care provider must occur twice within 30 days absent exigent circumstances



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COVERAGE: SERIOUS HEALTH CONDITION

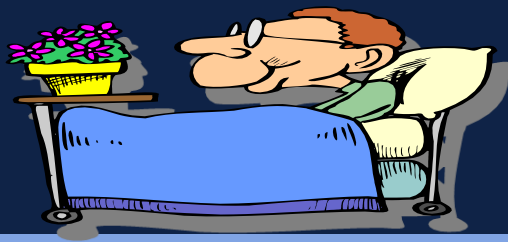
Continuing Treatment-Chronic Condition: §825.115(c)

■ Previous:

- Chronic serious health condition results in a period of incapacity or treatment that requires periodic visits to health care provider

Regulatory Revision:

- Periodic visits for treatment of condition by health care provider must be at least **twice** a year



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ENTITLEMENT: BONUS/INCENTIVE PAY



Equivalent Pay: §825.215(c)

■ Previous:

- FMLA absence may not disqualify employee from eligibility for bonus for meeting specified goal, such as perfect attendance, but bonus may be pro-rated based on total earnings or actual hours worked

■ *Regulatory Revision:*

- Bonus or incentive based on achieving specified goal (such as hours worked), payment may be denied if goal is not met due to FMLA leave *unless employee on leave for non-FMLA reason is paid bonus*

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NOTICE REQUIREMENTS: EMPLOYER

Eligibility Notice Requirements: §825.300(b)

- Previous:
 - Oral notice within 2 business days before leave begins
- *Regulatory Revision:*
 - Oral or written notice within 5 business days after leave is requested or it has knowledge that leave is for FMLA reason, absent exigent circumstances
 - Specific reason for ineligibility

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NOTICE REQUIREMENTS: EMPLOYER

Designation Notice Requirements: §825.300(d)

■ Previous:

- Employer must orally designate leave as FMLA within 2 business days after employee requests it or employer acquires information to qualify it as FMLA leave, with written designation by next payday

■ *Regulatory Revision:*

- Employer must give written designation notice leave counts as FMLA within 5 business days after acquiring information to determine that it qualifies
- Designation notice must inform employee if substitution of paid leave is required

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NOTICE REQUIREMENTS: EMPLOYEE

Foreseeable Leave Notice Requirements: §825.302

■ Previous:

- At least 30 days notice or as soon as practicable, normally within 2 business days of learning of leave need

■ *Regulatory Revisions:*

- At least 30 days advance notice or as soon as practicable
- As soon as practicable varies but should be the same day or next business day of learning of need for leave
- If employee notice is less than 30 days, employer may require explanation
- Employee must make reasonable effort to schedule planned treatment so as not to disrupt operations
- Intermittent leave must be medically necessary

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NOTICE REQUIREMENTS: EMPLOYEE

Unforeseeable Leave Notice Requirements: §825.303

■ Previous

- As soon as practicable, normally within 2 business days of learning of need for unforeseeable leave

■ *Regulatory Revision*

- Employee must provide notice as soon as practicable, or within time required by employer's usual notice requirements, absent exigent circumstances
- Sufficient information to determine if leave qualifies is required; calling in sick without more is insufficient
- Non-compliance with usual notice requirements may result in delay or denial of leave

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CERTIFICATIONS

Certification General Rules: §825.305

- Previous:
 - If required, request made within 2 business days after employee requests foreseeable leave or after unforeseeable leave commences
- *Regulatory Revision:*
 - If required, request made within 5 business days after foreseeable leave is requested or within 5 business days after unforeseeable leave commences
 - Employer may request at later time if reason exists to question appropriateness of leave or its duration

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CERTIFICATIONS

Certification General Rules: §825.305(d)

- Previous:
 - If not returned within 15-days and employee made good faith effort, must give extension; if employee did not make diligent effort or not returned after extension, employer may *delay or deny* leave
- ***Regulatory Clarification:***
 - Employer must inform employee of consequences
 - Failure to provide complete, sufficient certification, even with opportunity to cure, or failure to provide any certification may result in denial of FMLA leave

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CERTIFICATIONS

Certification Authentication/Clarification: §825.307

■ Previous:

- If employer wants to authenticate or clarify a complete certification, only employer doctor with employee consent may contact employee's doctor

Regulatory Revision:

- Employer doctor, HR professional, leave administrator or manager may contact directly employee's doctor to authenticate/clarify a sufficient certification
- Authentication means the doctor completed/authorized the form; clarification means understanding writing or meaning of response

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CERTIFICATIONS



Certification Authentication/Clarification: §825.307

■ *Regulatory Revision Cont.:*

- Employer may not solicit more information than certification permits
- Employee consent to contact their doctor cannot be required; if employee refuses, leave may be denied where clarification not resolved

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PART II: MILITARY FAMILY LEAVE



■ Photo Courtesy of the Department of Defense

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ACTIVE DUTY LEAVE

- 5th basis for taking leave
- Covers eligible employees who have
 - Parent
 - Spouse
 - Son or Daughter
- “Covered Servicemembers” on Active Duty *or* receive notice of Active Duty

ACTIVE DUTY LEAVE

To qualify for “family military leave,” an employee must be:

- Eligible to take FMLA leave;
- The spouse, son, daughter, or parent of a Servicemember who is on active duty or who is called to active duty in the for any branch of the military (including the National Guard or Reserves) and
- Requesting the leave because of a “qualifying exigency.”

If the above requirements are met, the employee is entitled to 12 weeks of FMLA leave, which can be taken intermittently.



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ACTIVE DUTY LEAVE

- Initially, a the call to active duty required a “contingency operation” as designated by the Secretary of Defense (involved in military action against an enemy of the United States or against an opposing military force) or resulted from a declaration of war or national emergency as declared by the President or Congress. All military operations supporting efforts in Iraq and Afghanistan were “contingency operations.”
- On October 28, 2009, President Obama eliminated the requirement that the active duty be in support of a contingency operation.



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ACTIVE DUTY LEAVE

- Leave provided for “qualifying exigency” tied to Active Duty or notice of impending Active Duty
- Leave is for maximum of 12 weeks
- Leave may be intermittent or a block
- Leave is Unpaid
- When initially promulgated, it did NOT cover spouse/parent/child of Regular Armed Forces member. However, it has recently been amended to include the spouse/parent/child of a regular armed forces member.

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QUALIFYING EXIGENCY



■ Eight Reasons to Take ADL:

1. Short Notice Deployment
 - Use up to 7 calendar days post-notice
2. Military Events/Activities
 - Official Ceremonies and Info Briefings
3. Childcare/School Activities
 - Arrange, provide, or transfer childcare
 - Attend mandatory functions/meetings
4. Financial/Legal Arrangements

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QUALIFYING EXIGENCY

- Eight Reasons to Take ADL:
 5. Non-medical Counseling for self or kids
 6. R&R w/ Servicemember Home on Leave
 - Up to 5 days per leave
 7. Post-Deployment Activities
 - Attend return ceremonies
 - Deal with death of servicemember
 8. Anything Else to which Company and Covered Employee Agree

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CAREGIVER LEAVE



■ Photo Courtesy of CNN.com

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CAREGIVER LEAVE

- Leave extended up to 26 weeks
- Covers employees that are the
 - Parent
 - Spouse
 - Son or Daughter
 - Next of Kin (closest living relative)
- Of a “covered servicemember”

CAREGIVER LEAVE

- “Covered servicemember” is member of the armed forces (or veteran within 5 years of treatment), *including* (not limited to) Nat’l Guard or reserves, who is:
 - Receiving/recovering from medical treatment
 - Receiving therapy
 - In outpatient treatment
 - Is considered “temporary disability retired”
- Due to “serious service-related injury or illness” or aggravation of pre-existing condition while on active duty



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CAREGIVER LEAVE

- “Serious injury or illness” is:
 - Injury or illness incurred in the line of duty while on active duty
 - Making servicemember unable to perform their duties



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Questions?

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